IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE; RICHARD LYMAN, JR., HUNG WO CHING, FRANK E. MIDKIFF, MATSUO TAKABUKI, MYRON B. THOMPSON, TRUSTEES OF THE BERNICE P. BISHOP ESTATE; HAWAII-KAI DEVELOPMENT CO.,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners

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Opinions Below

The opinion of the Court of Appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378 (9th Cir. 1978). The opinion of the District Court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42 (D. Haw. 1976).

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1978. The petition for a writ of certiorari was granted on February 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether fish ponds in Hawaii are private real property.

2. Whether federal regulatory jurisdiction and the navigation servitude are distinct.

3. Whether the navigation servitude can apply to private nonnavigable waters rendered navigable-in-fact only by extraordinary private efforts.

4. Whether mandating public access to Kuapa Pond violates fifth amendment prohibitions against uncompensated takings.

Statement

Kuapa Pond is situated wholly on property owned in fee simple by the Bishop Estate, located within a suburban development on the Island of Oahu, State of Hawaii (R. 260, 261, 264; Pet. App. 14a).

Geologically, Kuapa Pond dates from prehistoric times. It apparently was created in the late Pleistocene Period, near the end of the ice ages, when the rising sea level caused the shoreline to retreat and partial erosion of adjacent headlands generated sediment which accreted to form a barrier beach. The result was a shallow lagoon separated from the open ocean by the barrier beach formation (Tr.* 9-10; Pet. App. 15a). The water within the lagoon was brackish, containing a balance of sea water and fresh water including runoff from the surrounding mountains, rainfall

* All transcript ("Tr.") references are to the transcript of the trial proceedings commencing on Nov. 19, 1975.

and water from natural springs (Tr. 14, 22, 24, 19; Pet. App. 15a). The barrier beach was permeable, permitting percolation of both fresh and sea water through it, and was periodically breached by the force of the sea or accumulated fresh water (Tr. 14, 22, 26; Pet. App. 15a).

Prior to recorded history, perhaps as early as A.D. 1350, the Hawaiians began to use the lagoon as a fish pond (Tr. 90). To do so, they reinforced the barrier beach with stone walls built on top of it (Tr. 78; Pet. App. 15a).

The Hawaiian term for such fish ponds is "Loko Kuapa" which is derived from the Hawaiian words *loko* (pond), *kua* (backbone) and *pa* (wall) (Tr. 65-67, 81-82). Kuapa Pond's name is also its generic classification, i.e., it is a fish pond enclosed by a reinforced barrier beach (Pet. App. 16a).

At two sites where the barrier beach separating the pond from the sea had been periodically breached, the Hawaiians constructed *makaha,* or sluice grates, which permitted water to flow in and out of the pond but stopped the larger fish (Tr. 70, 71). The *makaha* also permitted drainage of the pond and aided in a form of dredging accomplished by stirring up the mud bottom and using the circulation of fresh water to flush the pond (Tr. 72; Pet. App. 16a). Spawn were able to pass through the grates and in this manner the pond was seeded with fish (Tr. 70, 71).

Seeding was also accomplished by catching the *pua,* or mullet spawn, for which adajacent Maunalua Bay was famous, and placing them in the pond, which was necessary because mullet do not spawn in fish ponds (Tr. 70; Pet. App. 16a). The entire operation of a pond was akin to farming, and was supervised by the paramount chief, assisted by a designated fish pond guardian (Tr. 69). The

fish pond itself was thus an integral part of the Hawaiian feudal system (Pet. App. 16a).

Any discussion of the Hawaiian real property law must begin with its feudal past. Prior to the introduction of western concepts of kingship, government and real property, all property rights emanated from the highest ranking chief who ruled by right of conquest and appointed and removed lesser chiefs at will (Tr. 84; Pet. App. 16a).

The lands of Hawaii anciently were divided into vast tracts called *ahupua'a*. The size and shape of the *ahupua'as*, and of their subdivisions called *ilis*, varied greatly. Generally, they were economically self-sufficient units reaching from the uplands to the sea, affording their respective inhabitants the necessities of life, including fish, crops and forest products. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-42 (1879). Everything within the *ahupua'a* or an *ili* was governed by the appointed chief, or *konohiki*, who in turn was responsible to the paramount chief of a given district or island (Tr. 84).

The fish ponds within any given *ahupua'a* or *ili* were always considered part of the land rather than part of the sea (Tr. 83; Pet. App. 16a-17a), and belonged solely to the *konohiki*, or local chief (Tr. 83, 84; R. 265). They were closed to the commoners, or *hoa'aina*, and even to other chiefs (Tr. 84, 87).

Sea fisheries were appurtenant to the *ahupua'as* and *ilis*. These were a form of piscary right and were closed to all except the residents of the dominant *ahupua'a* or *ili*. All sea fisheries rights were subject to *kapu*, or taboo rights, of the *konohiki*. *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904).

The ancient system prevailed until the Great Mahele of 1848, promulgated by King Kamehameha III. The Great Mahele effected a division of the lands of the kingdom between the king and the high chiefs. Commoners did not participate. The result was the elimination of the ancient system of feudal tenure and the perpetuation of the ancient land divisions. The *konohikis* were awarded the right to obtain fee title to the *ahupua'as* and *ilis* they had formerly administered and enjoyed as vassals of the king (Pet. App. 3a-4a, 17a).

After the Great Mahele, the *konohikis* were obliged to obtain an award from the Board of Commissioners to Quiet Land Titles, commonly referred to as the "Land Commission," to establish the boundaries of the ancient *ahupua'as* and *ilis* awarded to them, and to obtain a Royal Patent by paying a commutation tax to the Hawaiian Government. The Great Mahele lasted for forty-one days, but the process of obtaining Land Commission Awards, Boundary Certificates and Royal Patents continued throughout the Nineteenth Century. *See Harris v. Carter*, 6 Haw. 195 (1877).

So massive a land reform required that the divisions be made by name only, without benefit of survey, and the ancient boundaries remained in force. To this day, Hawaiian property titles generally derive from the Great Mahele and are referenced to the ancient *ahupua'as* and *ilis*. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-41 (1879). As explained below, the award of an *ahupua'a* or an *ili* carried with it all of the land, including fish ponds, within the anciently established boundaries (Tr. 83-88).

Kuapa Pond is a portion of the Ili of Maunalua which was awarded to the Princess Victoria Kamamalu in the Great Mahele of 1848. Maunalua was one of several *apanas* or parcels subsequently confirmed in Kamamalu. All of

Hawaii-Kai today, including the marina within Kuapa Pond, is legally described as Apana 30, Land Commission Award 7713, Royal Patent 4475, to Victoria Kamamalu (R. 264).

The Ili of Maunalua eventually passed from Kamamalu through her relatives to the Princess Bernice Pauahi Bishop. Upon the death of Princess Pauahi in 1884, the property passed to her trustees whose successors administer it today as part of the Bernice Pauahi Bishop Estate (R. 264).

The Bishop Estate and its lessees have paid and continue to pay real property taxes on Kuapa Pond. Since at least 1903, the Bishop Estate has leased the pond to various individuals and the public has been consistently excluded from using the pond without proper authority from the owners or their lessees. Bishop Estate and its predecessors have always maintained Kuapa Pond as private property (R. 264-65).

Early in this century, Kalanianaole Highway was constructed across the ancient barrier beach. Coral fill was placed on top of the sand bar to provide a highway foundation (R. 266). Bridges were constructed over the waterways between the *makahas* (sluice grates) and the sea, but prior to 1961 Kuapa Pond itself was used exclusively as a fish pond (R. 266; Pet. App. 17a).

On April 27, 1961, Bishop Estate entered into a development agreement with Kaiser Aetna granting master development rights to a 6,000 acre area today known as Hawaii-Kai. An integral part of the development agreement was the right of Kaiser Aetna to lease the area known as Kuapa Pond and to provide improvements such as dredging, walls and bridges (R. 266).

A formal lease of Kuapa Pond to a Kaiser Aetna company was executed on October 17, 1967 (R. 260; Defendants' Exhibit 11). The lease was subject to an earlier declaration of protective provisions, dated July 24, 1962, which granted each lessee of a waterfront lot a nonexclusive easement to use the waters of Kuapa Pond (R. 260; Defendants' Exhibit 13). The declaration of protective provisions reserved to the lessor the right to adopt and enforce rules and regulations concerning the use of the pond and to impose reasonable assessments on every marina lot lessee to pay the expenses of its care, maintenance and operation.

Development work began in 1961 (R. 266). Lands were graded, the pond was dredged and filled, and roads and bridges were constructed so that by the time of the trial a marina-style residential community of approximately 22,000 persons surrounded Kuapa Pond (R. 266-67).

Although the Corps of Engineers was aware of the work in Kuapa Pond, it did not require permits until January 11, 1972 (Defendants' Exhibits 14, 15 and 36; Plaintiff's Exhibit 17). A Corps of Engineers permit was obtained by Kaiser Aetna during late 1966 or early 1967 for construction of the Hawaii-Kai Marina channel and a bridge over it. The permit was required because part of the channel excavation work was to be performed in Maunalua Bay. It was understood by the Corps of Engineers and Kaiser Aetna that the marina was private, and that no permits were necessary for work in Kuapa Pond (Defendants' Exhibits 15, 16 and 36).

Kuapa Pond now has an approximate average depth of six feet, and the main channel connecting it with Maunalua Bay, an approximate depth of eight feet (R. 255). Pond maintenance has been financed by an annual $72.00 fee which is paid by the approximately 1,500 marina lot lessees,

and by approximately 142 non-marina lot lessees for boating privileges (Pet. App. 19a-20a). These fees also pay for marina patrol boats which remove floating debris, enforce boating regulations and maintain the privacy and security of the pond (Defendants' Exhibit 37).

A marina has been constructed with berthing and fueling facilities for the pleasure boats which have been licensed to use Kuapa Pond (R. 266). Use by boats is limited by the six foot pond depth and the thirteen and one-half foot clearance limit of the highway bridge over the main channel to Maunalua Bay (Tr. 105). Although the marina does have three sixty-foot boat slips (R. 257), boats of that size are not able to navigate the pond.

Commercial use of the pond has never been permitted. A small vessel, the "Marina Queen," was used for approximately five years starting in 1967 to show developers, potential purchasers and school children the Hawaii-Kai development. It was also used for a brief period in 1973 to introduce Hawaii-Kai to Waikiki tourists, an activity which the District Court found to be *de minimis* (Pet. App. 29a). The "Marina Queen" has always been operated solely within the pond waters (R. 255-57).

Kuapa Pond is not a commercial harbor. It is a private recreational haven for sailing, boating, water skiing, crabbing, fishing and moorage of pleasure boats (Defendant's Exhibit 37).

Because Bishop Estate and Kaiser Aetna disputed the January 11, 1972 determination of navigability by the Army Corps of Engineers (Plaintiff's Exhibit 17), the Corps instituted suit on July 6, 1973 in the United States District Court for the District of Hawaii seeking a declaratory judgment that Kuapa Pond was subject to regulation under

Section 10 of the Rivers and Harbors Act, and an injunction preventing denial of public access to Kuapa Pond (R. 1-13).

After a nonjury trial in November 1975, the District Court rendered a written decision on February 6, 1976 (Pet. App. 13a-34a). It granted a declaratory judgment that Kuapa Pond was subject to Rivers and Harbors Act regulatory jurisdiction upon the basis that " . . . the marina is in fact used in interstate commerce both to raise revenue for Kaiser Aetna and to transport residents and nonresidents by waterway into and out of Maunalua Bay" (Pet. App. 29a-30a).

The District Court denied, however, the request for injunctive relief, concluding that the right of public use did not necessarily follow from the government's right to regulate. While it recognized the right of the public to pass over *naturally* navigable waters, the court held that there is no right of public access to the private waters of Kuapa Pond, and that its transformation into a marina created no public rights. The government could not appropriate those waters for public use without payment of just compensation (Pet. App. 31a-33a).

Both sides appealed from the adverse rulings against them to the United States Court of Appeals for the Ninth Circuit. On August 11, 1978, the Ninth Circuit issued an opinion affirming the District Court's finding of regulatory jurisdiction, but reversing its denial of injunctive relief (Pet. App. 1a-12a). It upheld regulatory authority upon the grounds that Kuapa Pond, as artificially improved, was capable of commercial use. As to public use, it held that Kuapa Pond lost its private fish pond characteristics upon transformation into a marina, and that the public was entitled to access because regulatory authority and the

navigation servitude cannot consistently be separated; thus no compensation was necessary.

This Court granted Kaiser Aetna's and Bishop Estate's petition for writ of certiorari on February 20, 1979.

Summary of Argument

I. Kuapa Pond is a unique Hawaiian form of private real property. From the earliest times, Hawaiian jurisprudence has recognized the right of owners to exclude all others, including the government, from privately owned fish ponds. In fact, it does not distinguish between fish ponds and fast land. There is nothing in Hawaiian law or practice which suggests any public right in fish ponds. Rather, since at least 1851, fish ponds have been specifically excepted from statutes opening the sea fisheries to public use.

Congress recognized the existence of private property rights in fish ponds in Section 95 of the Organic Act passed following annexation of the Hawaiian Islands by the United States. The Act specifically exempts fish ponds from free public access. Congress thereby confirmed well established traditional viewpoints.

The Supreme Court also recognized unusual private water property rights in *Damon v. Territory of Hawaii,* 194 U.S. 154, 158 (1904), wherein Justice Holmes remarked that the Court had no choice but to acknowledge and protect private rights sanctioned by legislation, "however anomalous [they are] . . . ."

The District Court concluded similarly. While its findings and conclusions of Hawaiian law have not been disputed, the Ninth Circuit skirted those findings by tacking on the right of public access to the federal regulatory authority.

Petitioners, as private owners and lessees of Kuapa Pond, are entitled to control access and to have this Court protect that right. The instruments of annexation so require. The prior decisions of this Court so require. Principles of international law so require. *Knight v. United Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891).

II. Although the District Court properly analyzed the scope of federal regulatory jurisdiction and the navigation servitude as separate questions (Pet. App. 21a), the Ninth Circuit, without citation of any supporting authority, held that the scope of federal regulatory jurisdiction over navigable waters and the right of public use under the navigation servitude "cannot consistently be separated" (Pet. App. 11a). Having affirmed the District Court's finding that regulatory jurisdiction existed under the Rivers and Harbors Act, the Ninth Circuit held that a noncompensable right of public use automatically followed.

Federal authority over navigable waters may vary in scope. Exercise of this power for different purposes has often been recognized to justify different results. The purposes of regulatory authority and the navigation servitude are different; their scopes are different.

The servitude is a more limited concept than full commerce clause regulatory power. Its fundamental purpose is to preserve public navigable waters for public use. Public navigable waters for purposes of the servitude, as defined by *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871), and embellished by *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-408 (1940), are those waters which in their original condition, or with *reasonable* improvements, are susceptible to use in interstate commerce. Nei-

ther fast lands nor nonnavigable waters have been subjected to the servitude. Its scope has been limited by its purpose.

The regulatory power of Congress under the commerce clause is far broader in scope. Commerce may be regulated wherever it goes, whether the highway on which it travels be water or land, natural or artificial. Jurisdiction under the Rivers and Harbors Act itself has been extended to all activities affecting the capacity of navigable waters, even if occurring on fast lands or nonnavigable waters. Today, regulatory authority is concerned as much with environmental protection as navigation.

Whatever coincidence there once may have been between regulatory power and the servitude no longer exists. The Ninth Circuit's equation of these distinct concepts was therefore entirely improper.

III. Kuapa Pond in its natural condition was a private nonnavigable water body isolated from the open ocean. It was never susceptible to or used in commerce. It was not public navigable waters by any standard.

Kuapa Pond was improved only by extraordinary private efforts for use by pleasure boats in conjunction with a surrounding residential development. No public funds were expended and none are intended to be paid for a right of public access. No objection to existing structures in the pond has been made nor is any comprehensive public project involved. What the government now seeks is free public access.

No public purpose underlying the navigation servitude justifies its application to privately improved nonnavigable waters. No national need to preserve such waters ever existed. Regulatory power suffices.

The boundary of the servitude must remain at the edge of naturally navigable waters. The servitude's rule of no compensability is a harsh concept as presently applied; no further extension is warranted—particularly when uncompensated appropriation of long-vested private rights and elimination of presently existing state control will result.

IV. Requiring public access to Kuapa Pond violates the Petitioners' constitutional rights to compensation. The District Court carefully and correctly analyzed the pond's status vis-a-vis principles of common law and Hawaiian property law, and concluded the pond is private property, never subject to an overriding easement in favor of public use. In recognizing that conversion to a marina did not alter its exclusive status, the District Court held that waters never subject to the servitude could not now be converted to public waters by invocation of a servitude, i.e., the government cannot take by means of an easement which it *never* had.

The question raised by the government's attempt to fabricate a servitude in the present case is novel. It is the first instance, of which Petitioners are aware, in which the Corps of Engineers has boldly sought to open a private water body to the public as an end unto itself. No federal project is advanced or abated, no goal in furtherance of navigation or environmental protection is to be achieved—the only goal is public access. To obtain access to such waters, the government should be required to follow established condemnation procedures with just compensation to Petitioners. The Corps of Engineers, however, seeks to avoid this burden by an inequitable and unconstitutional taking of Petitioners' property rights.

This taking by inverse condemnation will have serious consequences, causing material injury to Petitioners. These concerns do not reflect elitism, but a realistic appraisal of the hazards of uncontrolled access to an area of limited capacity.

Clearing the pond of debris, providing dredging and maintenance, and monitoring compliance with water safety rules is done at private expense. The Corps has no funds budgeted for those responsibilities.

Petitioners recognize the national need for some carefully defined federal power over water bodies traditionally considered to have been subject to a public right to way. However, to extend the navigation servitude to all waters subject to regulation makes little sense when compensation is required for takings of fast lands and air rights. The history of the servitude does not justify its expanded application in this case, especially considering that it has been characterized as derived from and narrower than the commerce clause. This noncompensable taking cannot be justified as incident to regulation; it ignores fifth amendment protections.

This entanglement of regulatory authority and the navigation servitude warrants judicial clarification in the context of their separate national purposes. A rational test would allow regulation, while permitting public exclusion from private waters which have been improved only by privately financed extraordinary means and were not navigable in their natural state pursuant to the *Appalachian* standard.

ARGUMENT

I.

Fishponds Are Private Real Property, Part of the Land and Not Part of the Sea.

A. *Unlike the Sea Fisheries, Fish Ponds Were Never Subject to Public Use.*

From the earliest practices of the native chiefs, through the complex statutory framework of the Nineteenth Century land reforms, and to the present day, Hawaiian jurisprudence has always respected fish ponds as the private real property of their owners and has protected the exclusive rights of those owners.

In ancient times, the fish pond was the property of the governing chief. He administered it through his subordinate chiefs and he alone was entitled to reap the benefit of the fish pond. Others, including other chiefs, were excluded unless invited (Tr. 83-85; R. 265; Pet. App. 16a).

Nineteenth Century land reforms abolished the ancient system of tenure, but the ancient land divisions were retained as the basic units of property title. The Great Mahele of 1848 was conducted solely by reference to the names of the ancient *ahupua'as* and *ilis* without benefit of survey. Although formal definition of boundaries was therefore left to another time, it was well established that a Mahele Award carried with it whatever was included in the tract from ancient times. *In re Boundaries of Pulehunui,* 4 Haw. 239, 240 (1879).

Nothing in the Mahele nor in the subsequent evolution of Hawaiian land law altered the private nature of fish ponds. There was never any suggestion that the many fish ponds

throughout the kingdom were open to public use or public navigation.

This was not the case with the sea fisheries,[1] and a comparison of the legal fate of the fisheries with that of the fish ponds reveals the uniquely private nature of the fish ponds as a species of real property legally equivalent to fast land.

As early as 1839 Kamehameha III opened certain of the sea fisheries of the people.[2] He did so by exercise of his ancient, pre-Mahele rights as king and lord paramount. *Damon v. Territory of Hawaii,* 194 U.S. 154, 158-59 (1904).

Following the Great Mahele, Kamehameha III opened all of the sea fisheries appurtenant to government lands to the public.[3] In so doing, he specifically excluded government fish ponds from the Act. Section 2 of the Act provides as follows:

> All fishing grounds appertaining to any government land, or otherwise belonging to the government, excepting only ponds, shall be, and are, hereby, forever, granted to the people for the free and equal use of all persons: Provided, however, that, for the protection of such fishing grounds, the minister of the interior may taboo the taking of fish thereon, at certain seasons of the year.

[1] The sea fisheries, a unique form of ocean piscary right, were appurtenances of the *ahupua'as,* and the right to fish in them was limited to the tenants of dominant *ahupua'a. See Damon v. Terr. of Hawaii,* 194 U.S. 154, 158 (1904); *Haalelea v. Montgomery,* 2 Haw. 62 (1858).

[2] Enactment of His Majesty Kamehameha III of June 7, 1839 (Ch. 3, Laws of 1839).

[3] Act of May 15, 1851. Codified in Hawaiian Civil Code of 1859, Section 384 (Defendants' Exhibit 6).

The Act remains in force today as Section 188-1, Hawaii Revised Statutes (1976).

Similarly, Kamehameha III acted to restrict *konohiki* rights in the sea fisheries appurtenant to private lands by regulating their power of taboo, and by forbidding certain practices which frustrated use of the sea fisheries by the people resident in those privately owned *ahupua'as.*

The various acts were eventually codified and were in effect at the time of the annexation of Hawaii to the United States in 1898. Sections of these acts are still in force as portions of Chapter 188, Hawaii Revised Statutes (1976).[4]

Conversely, no statute of the Hawaiian Government ever purported to open the fish ponds to the public, or to regulate the *konohikis'* use of them. Instead, numerous statutes concerning fish and fisheries specifically exempted fish ponds and their owners from compliance.[5]

B. *Hawaiian Jurisprudence Has Uniformly Treated Fish Ponds as Private Real Property.*

Ironically, it is precisely because private ownership of fish ponds was such a fundamental concept of Hawaiian law that there are no statutes or case authorities which specifically state the proposition. As the District Court cogently observed, private ownership was so commonly accepted that the issue was not raised, and: "Dictum, under these facts, enhances rather than detracts from the strength of the legal precedents" (Pet. App. 25a).

[4] These statutes were codified in Hawaiian Civil Code of 1859 as Sections 387-392 and 394, and today appear in Sections 188-3 through 188-10, Hawaii Revised Statutes (1976).

[5] *See generally* Chapter 188, Hawaii Revised Statutes (1976), concerning fishing rights and regulations, which codifies earlier enactments.

The treatment of fish ponds as the legal equivalent of fast land is evident in the work of three Hawaiian tribunals: The Land Commission, the Boundary Commission and the Hawaiian Supreme Court.

The Land Commission. The Land Commission was created under Part I, Ch. VII, Article IV, of the Act to Organize the Executive Departments of the Hawaiian Islands, adopted April 27, 1846, and was charged with ". . . the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any *landed property* acquired anterior to the passage of this Act, . . ." (Emphasis added.) The Act repeatedly stated that the purpose of the Land Commission was to resolve "claims to land," and during its term the Land Commission consistently refused to examine title to the sea fisheries on the ground that its jurisdiction was limited to land titles. *Carter v. Territory of Hawaii,* 200 U.S. 255, 257 (1906); *State v. Hawaiian Dredging Co.,* 48 Haw. 152, 173, 397 P.2d 593, 606 (1964).

When the Land Commission was dissolved as of March 1855 by the Act of July 20, 1854,[6] Section 3 of the Act stated the legal effect of the Commission's work:

> Any award of the Land Commission not appealed from . . . shall furnish as good and sufficient a ground upon which to maintain an action for trespass, ejectment or other real action, against any person or persons whatsoever, as if the claimant, his heirs or assigns, had received a Royal Patent for the same, . . .

Given the refusal of the Land Commission to deal with anything but land and the language of the governing Acts,

[6] Laws of 1854, p. 21; Civil Code p. 415.

it is significant that the Land Commission routinely awarded title to fish ponds, including Kuapa Pond, which is part of Land Commission Award 7713.

This fact led the Hawaii Attorney General to conclude that "those dealing with land in the early days regarded fish ponds as part of the land they fronted." HAW. OP. ATT'Y. GEN. 1689, at 460, Feb. 2, 1939 (Defendants' Exhibit 8).

The Boundary Commission. The Boundary Commission, created by the Act of August 23, 1862 to settle the boundaries of the ancient *ahupua'as* and *ilis,* which had been awarded by name only, was similarly limited to adjudicating real property disputes. Laws of 1862, p. 27. It was without jurisdiction to settle the boundaries of the sea fisheries. *Bishop v. Mahiko,* 35 Haw. 608, 658 (1940). Nevertheless, the Boundary Commission routinely included fish ponds as part of the land area of the *ahupua'a* or *ili* to which it belonged. *In re Application of Kamakana,* 58 Haw. 632, 638-41, 574 P.2d 1346, 1349-51 (1978); HAW. OP. ATT'Y. GEN. 1689, *supra,* at 459.

Thus, on June 13, 1884 when the Commissioner of Boundaries determined the boundaries of the Ili of Maunalua, he defined the seaward boundary by reference to the wall of the fish pond, clearly including the body of Kuapa Pond within the land of Maunalua (Defendants' Exhibit 4).

The Hawaii Attorney General concluded that the Boundary Commission included fish ponds within the land "because *kamaaina* testimony[7] regarded the pond as part of the

[7] "Kamaaina testimony" refers to the testimony of persons familiar from childhood with any locality. *In re Application of Ashford,* 50 Haw. 314, 315, 440 P.2d 76, 77 (1968); *In re Boundaries of Pulehunui,* 4 Haw. 239, 245 (1879).

land and not the sea." HAW. OP. ATT'Y. GEN. 1689, *supra,* at 459.

The Hawaii Supreme Court. Hawaiian case law also confirms that fish ponds are a form of real property and pass with the *ahupua'a* or *ili* in which they are located. They pass not as mere appurtenances, but as intrinsically valuable real property. Thus, in *Harris v. Carter,* 6 Haw. 195, 197 (1877), the court said:

> . . . If a man sells his house-lot, the conveyance will be held to include the fountain or the garden which is in the house-lot.
>
> So a grant of an Ahupuaa will include the grantor's fish ponds or kalo [taro] patches lying with the Ahupuaa.

Another early Hawaiian decision illustrates this common usage. *Haalelea v. Montgomery,* 2 Haw. 62, 63-64 (1858), involved a warranty deed given by High Chief Kekuaonohi. The deed's description fixed the seaward property boundary at the outer wall of three fish ponds. The grantee's right to sea fisheries was challenged, but not their title to the fish pond.

Similarly, in *In re Boundaries of Pulehunui,* 4 Haw. 239 (1879), the court affirmed the decision of the Boundary Commission after reviewing the testimony received by the Commissioners. All of the witnesses had assigned a large fish pond to one *ahupua'a* or the other. No one suggested that it was common property or part of the sea.

In another pre-annexation decision, *Kapea v. Moehonua,* 6 Haw. 49 (1871), the defendant claimed to have leased a fish pond to plaintiff's decedent. Mingling references to fish ponds, houselots and taro patches and making no distinction

between them, the Hawaii court even adjudicated the fish pond rental.

A subsequent case establishes that the sale or lease of fish pond is a transfer of real property and not merely a license to fish. In *Murphy v. Hitchcock,* 22 Haw. 665 (1915), the Hawaii court held that the purchaser of a fish pond lease at a sheriff's sale acquired an estate in realty, not the school of fish within the pond. The court carefully distinguished fisheries from fish ponds, characterizing fisheries as easements or appurtenances to land, whereas a leasehold interest in a fish pond "is not a privilege of fishing or taking fish from a pond . . . but an estate for years in the realty, . . ." 22 Haw. at 669-670.

More recently, in *Palama v. Sheehan,* 50 Haw. 298, 440 P.2d 95 (1968), the court reviewed an action to quiet title to Nomilo Pond on the Island of Kauai. The court's decision treats the pond as it would any other form of real property.

Two recent Hawaii Supreme Court decisions are worthy of particular note. In *State v. Hawaiian Dredging Co.,* 48 Haw. 152, 397 P.2d 593 (1964), and *In re Application of Kamakana,* 58 Haw. 632, 574 P.2d 1346 (1978), the court gave special attention to the codes and usages of the Hawaiian monarchy. Its decisions are therefore useful in understanding the nature of pre-annexation property rights.

State v. Hawaiian Dredging Co., 48 Haw. 152, 397 P.2d 593 (1964), concerned a Land Commission Award involving the Ili of Mokauea. The Ili consisted of *kula* (dry) land, fish ponds and a sea fishery. 48 Haw. at 162-63, 397 P.2d at 600. The private owners maintained that the Land Commission had awarded their predecessors fee simple title to all three areas. The State contended that only the area

inside the fish pond walls had been conveyed and " . . . that title to the sea bottom *makai* [seaward] of the fish pond remained in the Hawaiian government, . . . " Relying on the fact that the Commission "would not award [fisheries] as it did land," 48 Haw. at 174, 397 P.2d at 606, and other evidence, the court ruled the award did not include the sea fishery. Significantly, no one disputed the landowners' title to the fish ponds.[8]

In re Application of Kamakana, 58 Haw. 632, 574 P.2d 1346 (1978), was an appeal from a Land Court decree granting the applicant Torrens System title to Kanoa fish pond on the Island of Molokai. The fish pond was a *loko kuapa,* and extended into the sea. One contention of the State of Hawaii was that the pond was in the public domain, apparently because of its dilapidated condition.

In its discussion of the development of Hawaiian land titles, the court recognized that a grant of an *ahupua'a* included all within it and concluded that Kanoa Pond was included in the award. On that basis, and upon a finding that the State had not adversely possessed Kanoa Pond, the Hawaii Supreme Court affirmed the Land Court's decree registering Kamakana's title to Kanoa Pond. The language of the decision makes no distinction between fish ponds and other real property and leaves no room to doubt that the Hawaii Supreme Court today is of the same mind as its predecessor courts: A fish pond is a form of private real property from which the true owner is entitled to exclude all others, even if it is a dilapidated condition exposed to the sea and no longer used as a fish pond.[9]

[8] The court consistently used the term "land" to include both the *kula* land and the fish ponds. See, in particular, the discussion at 48 Haw. at 180, 397 P.2d at 609.

[9] Although the reported facts are not precise, the opinion does recite that the State of Hawaii contended that Kanoa Pond was no longer in existence at the time of the Land Commission Award covering it. The opinion also recites that even then (1854) it was no longer in use as a fish pond and that when conveyed in 1920, Kanoa Pond was described by reference to the line of the old seawall which *formerly* enclosed it. 58 Haw. at 634-35, 574 P.2d at 1347-48. The unmistakable inference is that in *Kamakana* the Hawaii Court confirmed Land Court (Torrens System) title to a fish pond, despite at least partial destruction of its seawall, and the fact that it was no longer used as a fish pond.

The holding in *Kamakana* is consistent with an earlier Hawaii Attorney General's Opinion. In that opinion, Attorney General Herbert Y. C. Choy concluded that where at one time a fish pond wall had enclosed a portion of the sea, the resulting fish pond, as well as the dry land conveyed with it, "became private property" upon conveyance by the government, and did not lose that status "by reason of the deterioration of the sea wall." He acknowledged, however, that in times of emergency "the public may enter that area [fish pond] and even beach boats" as the law permits a person to trespass on the property of another to save himself or his property. HAW. OP. ATT'Y. GEN. 57-159, Dec. 12, 1957 (Defendants' Exhibit 9).

The Hawaiian concept of fish ponds as part and parcel of the land has its origins in the ancient past, but the historic fact is indisputable. It is apparent in the decisions, methods and testimony of Hawaii's kings, justices, attorneys general, land commissioner, engineers and surveyors recorded for well over 125 years. Their uniform voice cannot be ignored or cast aside. Fish ponds are private real property from which the true owner may exclude all others, even if no longer used as fish ponds in the traditional sense and even if open to the sea.

C. *Congress Recognized the Existence of Unique Private Property Rights in Hawaiian Fish Ponds.*

Following annexation and pursuant to the Joint Resolution of Congress, a commission of five individuals was appointed to draft a plan of government for Hawaii. Since Hawaii was already a self-governing nation, it was intended that its municipal legislation remain in force, with modifications consistent with its new status. This intention was expressed in the Joint Resolution,[10] in the Commission's report to Congress[11] and in the resulting Organic Act.[12] The Commission drew heavily on existing Hawaiian statutes, copying some of them verbatim, or with stylistic changes only.

Walter F. Frear, Associate Justice of the Hawaiian Supreme Court, chaired the Commission's Committee on Fisheries which rendered a report on September 7, 1898.[13] Justice Frear's report carefully distinguished the fisheries from the fish ponds:

> In shoal waters along the shores there are many fish ponds, made artificially by the construction of stone walls of semicircular form with the shore line as a diameter, and with small openings through the wall for the flow of the tide. These are found on Government lands as well as private lands.

[10] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, the "Newlands Resolution," Resolution No. 55, 30 Stat. 750-51, July 7, 1898.

[11] Report of the Hawaiian Commission, S. Doc. No. 16, 55th Cong., 3rd Sess., Dec. 6, 1898.

[12] The Hawaiian Organic Act, Section 6, codified as 48 U.S.C. § 496.

[13] Report of the Committee Fisheries, Sept. 7, 1898, appended to the Report of the Hawaiian Commission, n. 11, *supra*, at pp. 93-95.

He also noted that under existing law:

> All fishing grounds appertaining to government lands or otherwise belonging to the government, excepting fish ponds, are free for all persons. . . . The fish ponds owned by the government are leased to private persons. . . .

Justice Frear suggested that the Committee on Public Lands consider the future disposition of government owned fish ponds and noted that privately owned fish ponds were already being leased from their owners by the Chinese and Japanese residents of Hawaii who had succeeded the Hawaiians in the fishing industry.

Justice Frear's report is persuasive of the unique nature of Hawaii's fish ponds, and evidences his familiarity with Hawaiian usage. Significantly, he recognized fish ponds as part of the land, subject to lease and private in nature, whereas fisheries were only appurtenant rights, subject to public navigation.

The Hawaiian Commission's draft Organic Act contained three sections relating to the sea fisheries and was introduced in both the House and Senate by Commissioners who were members of those bodies.[14] The language of what became Section 95 of the Hawaiian Organic Act (Pet. 3), now codified as 48 U.S.C. § 506, was not altered by Congress, becoming law April 30, 1900. That section provides in full as follows:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters

[14] S. B. 222, Dec. 6, 1899, and H. R. 2972, Dec. 8, 1899, 56th Cong., 1st Sess.

> of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided. (Emphasis added.)

It is at once apparent that Section 95 has its origins in the municipal legislation of Hawaii discussed by Justice Frear, and is a lineal descendant of the Act of May 15, 1851 set forth above (Defendants' Exhibit 6). While those sea fisheries not subject to vested rights were open to the public, fish ponds remained private, as they always had been; such was the municipal law of Hawaii and such was the intention of the men who drafted Section 95.[15]

When Section 95 of the Organic Act is considered in conjunction with then existing Hawaiian statutes and in the light of Justice Frear's report, it is apparent that the Organic Act wrought no change in the status of fish ponds. If anything, the existing Hawaiian law protecting private rights in fish ponds was expanded by the Organic Act to include "artificial enclosures." It is beyond doubt that despite the change in sovereignty, Kuapa Pond was after annexation the same private real property it always had been: "the legal equivalent of fast land." As such, it is just as deserving of protection as any other vested property right more familiar to Anglo-American law.

[15] The language of Section 95 of the Organic Act is duplicated in Article X, Section 3, of the Hawaii State Constitution (Pet. 4). Significantly, Section 96 of the Organic Act, now codified as 48 U.S.C. § 507, provided for the condemnation of fisheries by the government with payment of "just compensation" to the owner.

D. *As Private Real Property, Fish Ponds Are Entitled to Protection by This Court.*

This Court has held that unique Hawaiian property rights are entitled to protection. In *Damon v. Territory of Hawaii*, 194 U.S. 154, 158 (1904), a case instituted by the Bishop Estate to establish that Estate's right to a sea fishery, Mr. Justice Holmes concluded:

> A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right. . . . (Citation omitted.)

Accord, Carter v. Territory of Hawaii, 200 U.S. 255 (1906).

The words of Justice Holmes are compelling. Although they refer to the sea fisheries, they are equally applicable to fish ponds. Where, as here under the Hawaiian kingdom, property rights have been established by a government prior to annexation of the lands, those private property rights survive if they are recognized in and by the instruments of annexation.

This was the legal conclusion of the District Judge below (Pet. App. 25a-28a) which was summarily rejected by the Ninth Circuit (Pet. App. 9a-11a). The Circuit Court disregarded the fact that annexation did not abolish Hawaiian

law, that it was specifically determined that the municipal legislation of Hawaii would remain in effect, and that the framers of the Organic Act reserved for fish ponds the same protection they had always enjoyed under Hawaiian law.

The United States cannot now be heard, three quarters of a century later, to demand a renegotiation of the instruments of annexation. It is bound to protect all property rights in Hawaii emanating from the Hawaiian government prior to annexation. *Knight v. United Land Association,* 142 U.S. 161, 182-85 (1891); *San Francisco v. Le Roy,* 138 U.S. 656, 670-72 (1891). Indeed, as this Court observed in *Knight,* irrespective of annexation agreements, principles of international law would compel the same result (142 U.S. at 173-84).

II.

Federal Regulatory Jurisdiction and Navigational Servitude Are Distinct.

A. *The Circuit Court Incorrectly Held That Federal Regulation and the Right of Public Access Cannot Consistently Be Separated.*

The Ninth Circuit had before it for review two separate legal issues: federal regulatory jurisdiction and the right of public access. Although the District Court had properly analyzed these questions separately, the Circuit Court deemed them incapable of separation.

Having upheld the District Court's determination that regulatory jurisdiction existed,[16] the Circuit Court concluded that the public access question had, in effect, already been answered:

> [I]n our judgment, federal regulatory authority over navigable waters (which the district court recognized to exist) and the right of public use *cannot consistently be separated.* It is the public right of navigational use that renders regulatory control necessary in the public interest. (Emphasis added.)

(Pet. App. 11a).

The Court of Appeals took a familiar concept, *i.e.,* all public navigable waters are subject to federal regulation, and applied it in reverse, concluding that waters subject to federal regulation are public waters subject to the federal navigation servitude. No opinion of this Court so holds, the Ninth Circuit failed to cite authority to support its conclusion[17] and none exists so far as Petitioners are aware. The question is a novel one with enormous implications.

If all waters subject to regulation are thereby burdened by the navigation servitude, long-settled private rights in small water bodies will be abrogated without compensation.

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[16] The Ninth Circuit's holding on regulatory jurisdiction was premised solely upon Kuapa Pond's capability, as artificially improved, for use by interstate commerce (Pet. App. 5a-9a). The District Court premised its regulatory holding on the presence of interstate commerce in fact (Pet. App. 28a-31a). Neither court decided the government's alternative contention that tidal action by itself was sufficient to confer regulatory jurisdiction. The District Court reasoned that the unique property rights in fish ponds precluded such a holding (Pet. App. 24a-25a). The Ninth Circuit accepted *arguendo* the contention that the ebb and flow test could not render navigable a separate and distinct nonnavigable water body such as Kuapa Pond (Pet. App. 5a, n. 2).

[17] The Ninth Circuit cited *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377 (1940); *Weiszmann v. Dist. Eng, United States Army Corps of Eng's,* 526 F.2d 1302 (5th Cir. 1976); and *United States v. Stoeco Homes, Inc.,* 498 F.2d 597 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). These cases deal solely with commerce clause regulatory power, and do not involve or discuss any public access question.

This prospect is both remarkable and alarming. While the public interest may require extensive federal regulation to serve contemporary conflicting needs, there is no public need to go further and expropriate, on the pretext of regulatory authority, private property for public use. The purposes of regulation can be wholly served without transforming private waters into public waters.

B. *Federal Power Over Navigable Waters Has Many Legally Distinct Applications.*

The District Court properly recognized that "[t]he term 'navigability' has many legally distinct applications" (Pet. App. 21a). A water body may or may not be "navigable" depending on the purpose for which the federal power is exercised.

The question of federal power arises in a variety of contexts. The District Court noted title controversies, admiralty jurisdiction, commerce clause regulation and public access under the navigation servitude. Others include exercise of war powers, fulfillment of treaty obligations, assertion of property clause powers and pursuits on behalf of the general welfare. The scope of the federal power is not necessarily the same in each context. *See generally* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters,* 5 LAND & WATER L. REV. 391, 401-32 (1970).

For example, title to lands underlying navigable waters vested in the original colonies after the Revolution and in the new states upon admission. *Martin v. Waddell's Lessee,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagen,* 44 U.S. (3 How.) 212, 228-29 (1845). For title purposes, navigability is determined as of statehood and without regard to the presence or absence of interstate commerce. *See*

United States v. Oregon, 295 U.S. 1, 14 (1935); *United States v. Utah,* 283 U.S. 64, 75 (1931). Waters navigable for title purposes are not necessarily navigable for other purposes. There is thus nothing inconsistent between this Court's holding that the Great Salt Lake was navigable for title purposes, in *Utah v. United States,* 403 U.S. 9 (1971), and the holding of the Tenth Circuit that the same lake was not navigable for Rivers and Harbors Acts regulatory purposes, in *Hardy Salt Co. v. Southern Pacific Transportation Co.,* 501 F.2d 1156, 1165-69 (10th Cir.), *cert. denied,* 419 U.S. 1033 (1974).

Further, admiralty and maritime jurisdiction reflect the needs of the nation's shipping industry, applying even to a wholly artificial canal dug through fast lands. *E.g., Ex parte Boyer,* 109 U.S. 629 (1884). Yet, this Court has recently declined maritime jurisdiction over a crash of an airplane in the navigable waters of Lake Erie on a domestic flight on the ground that the alleged wrong did not bear "a significant relationship to traditional maritime activity." *Executive Jet Aviation v. Cleveland,* 409 U.S. 249 (1972). Waters subject to admiralty jurisdiction may not be navigable for other purposes. In *Adams v. Montana Power Co.,* 528 F.2d 437 (9th Cir. 1975), the Ninth Circuit concluded that although a dam-obstructed portion of the Missouri River might be navigable for purposes of commerce clause regulation, it was not navigable for admiralty purposes since its waters were no longer used by commercial vessels.

These examples demonstrate that the purpose behind the exercise of federal power is of paramount importance and deserving of careful analysis. Questions of regulatory jurisdiction and public access constitute no exception.

C. *The Federal Navigation Servitude Is More Limited in Purpose, Justification and Scope Than Federal Regulatory Jurisdiction.*

The navigation servitude and federal regulatory jurisdiction serve distinct national objectives. The servitude, while derived from the commerce clause, is narrower in scope; its purpose being to preserve the nation's public navigable waterways against private obstructions. Regulatory authority, on the other hand, is as broad as the full power of Congress under the commerce clause; its exercise is not limited to public navigable waters or to waters at all. Initially, these powers may have been coincidental in scope; today, however, regulatory power far exceeds the rational limits of the navigation servitude.

1. The fundamental purpose of the navigation servitude is to preserve public navigable water bodies for public use.

When Congress imposes the servitude to protect the public's right of way over public navigable waterways, it is beholden to no one:

> This navigational servitude—sometimes referred to as a "dominant servitude," . . . or a "superior navigation easement," . . .—is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." . . . The power "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." . . . (Citations omitted.)

United States v. Virginia Electric and Power Co., 365 U.S. 624, 627-28 (1961).

The burden of the servitude can be extraordinary, because no compensation is necessary when Congress is deemed to be exercising a paramount power to which navigable waters and underlying lands have always been subject. *E.g., United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U.S. 592, 596-97 (1941).[18] Unless this Court limits the servitude to its original purpose, namely, to insure unhindered right of way to protect the free flow of commerce, significant abuse of private rights will occur.

Although the roots of the servitude may be traced to England, where all lands under tidal waters were held in royal trust for the protection of public rights of navigation and fishery, the American servitude developed its own distinctive character. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-14 (1842).

Upon the Revolution, the people of the original states became sovereign and vested with absolute title to the navigable waters and soils underlying them, subject only to rights surrendered to the federal government. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-11 (1842). New states acquired upon admission "on an equal footing" the same sovereign powers. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). *See also Shively v. Bowlby*, 152 U.S. 1, 14-15 (1894).

The dominant power over navigation and navigable waters was relinquished under the Constitution to Congress pursuant to its power to regulate "commerce"[19] which, ex-

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[18] Full discussion of the rule of "noncompensability" and its current status is contained in Part IV of this Brief.

[19] U.S. CONST., art. I, § 8, cl. 3: "The Congress shall have Power . . . [t]o regulate Commerce with Foreign Nations and among the several States, and with the Indian Tribes;"

plained Chief Justice Marshall in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 190 (1824), includes "navigation." In order to prevent obstructions to public navigation, all "navigable waters" were considered "the public property of the nation." *See Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724-25 (1866).

Classification of waters which were "navigable" and "public" as opposed to "nonnavigable" and "private" remained for resolution. In this process, differences between English and American geography proved a major factor.

In England, the tide marked the limits of public waters both legally and practically. Tidal and navigable waters were synonymous, for the tide reached virtually all of England's navigable streams. Much the same situation existed initially in the original colonies, so that early cases understandably employed the English ebb and flow test.

With territorial expansion the ebb and flow test ceased to be workable. Great inland lakes and rivers proved as navigable and commercially useful as the oceans. The arbitrary tidal versus nontidal dichotomy of the English and early American courts was soon abandoned.

Maritime law pioneered the way. In *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851), this Court upheld admiralty jurisdiction over the Great Lakes and overruled its prior opinion in *The Steam-Boat Thomas Jefferson,* 23 U.S. (10 Wheat.) 428 (1825) (no admiralty jurisdiction on the Mississippi River). Chief Justice Taney traced the history of the ebb and flow test and rejected it as unfit for this country, where its application would be arbitrary, and require drawing an artificial line across the Mississippi at an uncertain point where the tide ceased its influence. 53 U.S. at 456-57. Jurisdiction was premised

". . . upon the navigable character of the water, and not upon the ebb and flow of the tide." *Id.* at 457.

Twenty years later the same test was adopted for commerce clause purposes in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). This Court held that ". . . the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters." Under the navigability-in-fact test, those waters are navigable waters which ". . . are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*

The navigability-in-fact test gave the government jurisdiction over all waters naturally capable of use in interstate commerce. It avoided drawing artificial boundaries across inland waters. It did not include small tidal water bodies not capable of use in interstate commerce.[20] The test served well the nation's expanding commercial needs by preserving major inland waters for public use, as this Court consistently recognized. *E.g., Barney v. Keokuk,* 94 U.S. (4 Otto) 324, 338 (1876) ("the great passageways of commerce and navigation"); *Escanaba Co. v. Chicago,* 107 U.S. 678, 682 (1882) (noting that inland waters in this country could be navigated for more than a thousand miles above the tide); and *Packer v. Bird,* 137 U.S. 661, 667 (1891) ("the susceptibility to use as highways of commerce . . . gives sanction to the public right of control . . . ").

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[20] Although *The Daniel Ball* involved an inland river and not a tidal water body, its rationale is equally applicable to tidal waters. It would be as arbitrary to subject a tidal creek with no potential commercial capability to the servitude as to exclude control of an inland river above the point of ebb and flow.

The public servitude was properly defined by the public commercial need.

The Great Lakes, the Mississippi River and other waters useful for commerce in their natural condition were held to be public navigable waters. But, shallow waterways not useful for commerce were held to be nonnavigable, such as the crevasse known as Red Pass in *Leovy v. United States,* 177 U.S. 621 (1900), and the upper reaches of the Rio Grande River in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899). Navigability-in-fact thus marked the border between "public" waters subject to the federal servitude and other waters exempt from its burden.

Navigable waters have continued to be gauged by their susceptibility to commerce in their natural condition, although it is now recognized that obstructions capable of being overcome by reasonable efforts do not prevent a finding of navigability. *E.g., The Montello,* 87 U.S. (20 Wall.) 430 (1874) (rapids and bars capable of being overcome by artificial improvements); *Economy Light & Power Co. v. United States,* 256 U.S. 113, 123 (1921) (a river once navigable "is within the power of Congress to preserve for purposes of future transportation," even though navigation is not presently possible due to artificial obstructions); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940) (a water body is navigable if it can be made useful for interstate commerce by means of "reasonable improvements," balanced in terms of "cost and need").

This Court has not extended the limits of the navigation servitude beyond the facts of *Appalachian.* Fast lands are not subject to the servitude. *E.g., United States v. Virginia Electric and Power Co.,* 365 U.S. 624, 627-29

(1961); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, 804-08 (1950); and *Pumpelly v. Green Bay Co.,* 80 U.S. (13 Wall.) 166, 177-81 (1871). Nor are nonnavigable waters. In *United States v. Cress,* 243 U.S. 316, 320-27 (1917), this Court held that the navigation servitude does not extend to nonnavigable tributaries of navigable streams and allowed compensation for destruction of a ford and loss of water power resulting from a federal lock and dam project on adjacent navigable streams.[21]

The "public" highways over which the nation may exercise complete control are its "navigable waters." In them, the nation may erect dikes, construct piers, dredge chan-

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[21] Subsequent cases have limited *Cress to* its facts, but have not overruled it, and have reaffirmed its validity *on* its facts. In *United States v. Chicago, M., St. P. & P. R.R. Co.,* 312 U.S. 592, 599 (1941), which held that no compensation was due for injury to structures located between high and low water mark of the Mississippi River, this Court remanded for resolution of the railroad's claim that two sections of embankment in question were located on a nonnavigable tributary. And in *United States v. Willow River Power Co.,* 324 U.S. 499, 505-07 (1945), which holds that no compensation is due for obstruction of a tailrace by raising of the level of a navigable river by means of a federal dam, this Court distinguished *Cress* as involving damage due to raising of the level of a nonnavigable stream and declined the government's invitation to overrule it.

United States v. Grand River Dam Auth., 363 U.S. 229 (1960), is sometimes claimed to have overruled *Cress.* However, this Court specifically declined to address the government's contention that the navigation servitude extended to nonnavigable streams; it ruled for the government upon the basis of express congressional determination that appropriation of the waters of the nonnavigable tributary was essential to a comprehensive flood control and navigation program. This Court had previously upheld the propriety of such a project, upon grounds of need to protect the navigable capacity of the navigable stream itself, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508 (1941). *Grand River* is further distinguishable in that the property rights asserted were of dubious validity and no more than a noncompensable business expectancy in any event.

nels and place dams,[22] without regard for any private rights. The nation has "always" been interested in preserving these waters for actual or potential needs of commerce.[23]

No comparable national interest exists in fast lands or nonnavigable waters. They lack reasonable potential for commercial use; no public navigation servitude has ever existed over them. The purpose of the servitude limits the scope of its dominant power.

2. The scope of federal regulatory jurisdiction is as broad as full congressional commerce clause power.

The power of Congress to regulate commerce is plenary in nature; its scope is as broad as interstate commerce itself. Congress may regulate commerce wherever it goes, whether the highway on which it travels be water or land, natural or artificial. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 341-42 (1893); *Dow Chemical Co. v. Dixie Carriers, Inc.,* 330 F. Supp. 1304, 1307-08 (S.D. Tex. 1971), *aff'd* 463 F.2d 120, 123 (5th Cir. 1972), *cert. denied,* 409 U.S. 1040 (1972). *Cf. Perry v. Haines,* 191 U.S. 17, 26-28 (1903) (admiralty jurisdiction). The power of Congress extends well beyond its power to regulate navigation on public navigable waters.

[22] *E.g., Gibson v. United States,* 166 U.S. 269 (1897) (dike); *Scranton v. Wheeler,* 179 U.S. 141 (1900) (pier); *Lewis Blue Point Oyster Cult. Co. v. Briggs,* 229 U.S. 82 (1913) (channel); and *United States v. Willow River Power Co.,* 324 U.S. 499 (1945) (dam).

[23] This Court has consistently voiced the view that navigable waters have "always" been subject to the navigation servitude, from its early decision in *Gibson v. United States,* 166 U.S. 269, 276 (1897), to its most recent decision in *United States v. Rands,* 389 U.S. 121, 123 (1967). This theory is hardly viable if applied to fast lands or nonnavigable streams to which the servitude has never applied.

The broad power of Congress over interstate commerce, including navigation, was established in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). However, in early history, when the needs of interstate commerce were in their incipient stage, this power of Congress lay largely "dormant," other than licensing acts and occasional action on bridges. So long as the power of Congress lay inchoate, the states retained plenary power over their internal waters.[24]

Not until this Court decided *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), upholding Oregon's right to authorize a bridge obstructing navigation of the Willamette River, did Congress react. It then enacted the Rivers and Harbors Act of 1890 prohibiting unauthorized obstructions to navigable capacity of national waters. Congress later compiled and codified all existing laws for protection of navigable waters in the Rivers and Harbors Act of 1899,[25] which is presently codified as 33 U.S.C. § 401, *et seq.*[26]

[24] *E.g., Willson v. Black Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 251-52 (1829) (dam across a navigable creek); *Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 725-32 (1865) (bridge across navigable river); *Pound v. Turck,* 95 U.S. 459, 463-64 (1877) (dam and boom across river); *Escanaba Co. v. Chicago,* 107 U.S. 678, 683-87 (1882) (closing of bridge draws during rush hour); *Cardwell v. American Bridge Co.,* 113 U.S. 205, 208-10 (1885) (bridge across river); and *Hamilton v. Vicksburg, S. & P. R.R.,* 119 U.S. 280, 281-82 (1886) (bridge over stream).

[25] This Court has analyzed the legislative history of the Acts in *United States v. Penn. Indus. Chem. Corp.,* 411 U.S. 655, 663-66 (1973); *United States v. Standard Oil Co.,* 384 U.S. 224, 226-28 (1966); and *United States v. Republic Steel Corp.,* 362 U.S. 482, 485-86 (1960). The 1899 Act was not intended to make any substantial change in existing law. However, Congress did add language to the 1899 Act to overrule this Court's construction of the 1890 Act as permitting state as well as federal authorization of obstructions. *See United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 214-15 (1900); and *North Shore Boom & Driving Co. v. Nicomen Boom Co.,* 212 U.S. 406, 412-13 (1909).

[26] Section 401 prohibits unauthorized construction of bridges, dams and dikes. Section 403 generally prohibits unauthorized ob-

The 1899 Act " . . . was obviously intended to prevent obstructions in the Nation's waterways." *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201 (1967). Until recently, the Act was usually applied to regulate structures obstructing navigation on naturally navigable-in-fact waterways. *E.g., Union Bridge Co. v. United States,* 204 U.S. 364 (1907); *Louisville Bridge Co. v. United States,* 242 U.S. 409 (1917).

As so applied, the scope of federal regulation was comparable to the scope of the navigation servitude. In recent times, however, the extent of regulation has been greatly expanded and now far surpasses the limits of the navigation servitude.

3. In light of recent history any claim that regulatory power and the servitude are identical in scope must fail.

Seeds of expansive regulation were present in the original Acts. This Court early construed the 1890 Act, in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 708 (1899), to reach activities on nonnavigable streams substantially affecting the capacity of navigable waters. *See also Sanitary District of Chicago v. United States,* 266 U.S. 405, 428-29 (1925) (construing the 1899 Act). But regulation did not attain extended application until recent times.

Currently the 1899 Act is applied far beyond the bounds of the navigation servitude. It has ceased to be a limited

structions. Section 404 authorizes establishment of harbor lines. Section 407 prohibits deposit of refuse. Section 409 prohibits obstruction by vessels. The foregoing description is necessarily general and the words of each section must be referred to for a full appreciation of their scope.

statute for protection of public navigation and has become an instrument of environmental protection.

This Court itself has charitably construed the 1899 Act and provided the impetus for expansive environmental regulation. *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960) (discharge of industrial solids); *United States v. Standard Oil Co.,* 384 U.S. 224 (1966) (discharge of aviation gasoline).

In December 1968, the Corps of Engineers published new regulations stating for the first time that pollution, environmental, and conservation factors would be considered in passsing upon permit applications. *See United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 672-73 (1973). Consideration of such factors, in the context of permits for work in navigable-in-fact waters, was expressly upheld in *Zabel v. Tabb,* 430 F.2d 199, 207-14 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971).

Thereafter, the Corps extended its environmental program by asserting jurisdiction over tidal marshes which were in no sense navigable-in-fact. This position was first upheld in *United States v. Baker,* 2 E.R.C. 1849 (1971) (unofficial report of oral decision). Subsequently, the Corps amended its regulations to assert jurisdiction over all tidal waters, regardless of navigability-in-fact. 37 Fed. Reg. 18291 (1972) (first codified in 33 C.F.R. § 209.260(k)(2), now § 329.12(b)). Favorable rulings were ultimately obtained from other courts.[27]

Moreover, the Fifth Circuit, in *United States v. Sexton Cove Estates, Inc.,* 526 F.2d 1293, 1296-99 (5th Cir. 1976),

[27] *E.g., United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 604-06, 610 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); *United States v. Cannon,* 363 F. Supp. 1045, 1050 and n. 3 (D. Del. 1973); and *United States v. Lewis,* 355 F. Supp. 1132, 1136-37 (S.D. Ga. 1973).

although unwilling to give the Corps jurisdiction over all waters subject to tidal fluctuations,[28] has resurrected *Rio Grande's* "affect" test to uphold Corps' jurisdiction over fast land activities which affect adjacent navigable waters.

Congress has authorized even broader regulatory jurisdiction in the Water Pollution Control Act of 1972. 33 U.S.C. § 1251, *et seq.* "Navigable waters" are defined in 33 U.S.C. § 1362(7) to include "the waters of the United States," a term courts have consistently interpreted to apply to discharges into nonnavigable as well as navigable waters. *E.g., United States v. Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753-56 (9th Cir. 1978); and *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977). Even a discharge into municipal sewers has been held within the coverage of the Act. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976).

The expansion of jurisdiction effected by these cases is illustrated by this Court's opinion in *Leovy v. United States*, 177 U.S. 621 (1900). There, this Court considered the navigability of Red Pass, a crevasse created by Mississippi River overflow and which at one end had become a sea marsh; this Court discussed the question entirely in terms of navigability-in-fact and did not suggest that any tidal portion of the pass might on that ground alone be navigable.

In recent amendments to its regulations, the Corps of Engineers has also asserted jurisdiction over artificial water bodies subject to the ebb and flow of the tide pursuant to the Third Circuit opinion in *Stoeco Homes, supra*, by adding a new sentence to 33 C.F.R. § 329.8(a)(i) (formerly § 209.260(g)(1)(i)). *See* 42 Fed. Reg. 37133 (1977). The Corps recognizes that its regulatory authority and a right of public access are not coextensive, for it continues to concede that a privately constructed and operated canal not used in interstate commerce may remain private. 33 C.F.R. § 329.8(a)(3) (formerly § 209.260(g)(1)(iii)).

[28] As the Court retorted, in the context of canals exhibiting tidal fluctuation after excavation: "If it did, every hole dug in South Florida would be within the Corps' jurisdiction." 526 F.2d at 1299.

The scope of federal regulatory jurisdiction has been considerably extended in a comparatively short period of time. The commerce power has already overflowed the beds and shores of navigable waters and been extended far inland. The focus of regulatory authority has shifted from prevention of obstructions to navigation to a broad environmental protection program. Whatever coincidence there may once have been between the respective scopes of federal regulatory authority and the federal navigation servitude no longer exists. The regulatory power has now far surpassed the servitude.

III.

The Navigation Servitude Does Not Apply to a Private Nonnavigable Water Body Rendered Navigable-in-Fact Only by Extraordinary Private Efforts.

A. *Kuapa Pond in Its Natural Condition Was a Private Nonnavigable Water Body.*

Kuapa Pond in its natural condition[29] was an isolated inland water body cut off from the open sea by a barrier beach formation and had existed in this condition from as early as 1350 (Tr. 90, LL. 11-12). Its shallow waters restricted navigation to flat-bottomed boats; the wall of the pond made it impossible to navigate to adjacent ocean waters. It was never used commercially except for propagation of fish within the pond itself (R. 264-66).

Navigation by boats of so shallow a draft as the boats that tended mullet in Kuapa Pond has never sufficed for navigability purposes. *E.g., Leovy v. United States*, 177

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[29] By "natural condition" is meant the condition of the pond as historically recorded. At some prehistoric time the area of the pond may have been fast land or sea or part of each.

U.S. 621, 633 (1900) (small luggers or yawls used by fishermen); *Pitship Duck Club v. Sequim,* 315 F. Supp. 309 (W.D. Wash. 1970) (small duck hunting boats); *North American Dredging Co. of Nevada v. Mintzer,* 245 F. 297 (9th Cir. 1917) (duck boats or punts for hunting or fishing); and *Toledo Liberal Shooting Co. v. Erie Shooting Club,* 90 F. 680 (6th Cir. 1898) (canoes and flat-bottomed ducking boats).

Nor was Kuapa Pond navigable under *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940). Pursuant to that opinion, the potential improvements must be "reasonable" with "a balance between cost and need." As the District Court noted, the government presented no evidence on the need for or cost of improvement of the pond in its natural condition (Pet. App. 23a-24a). The record is devoid of any suggestion that there was ever a reasonable need to improve Kuapa Pond for navigation.[30]

The government's contention that Kuapa Pond was navigable simply because it exhibited tidal fluctuations is wholly inconsistent with the navigability-in-fact test.[31] This court characterized the ebb and flow test as not "any test at all" in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). While that case involved an inland river, the navigability-in-fact test it adopted is of uniform application to tidal and nontidal waters alike; it would be as arbitrary to classify shallow creeks as navigable solely because some tidal influence is present as to draw tidal lines across the Mississippi. Kuapa Pond was not part of the adjacent ocean;

[30] Petitioners did introduce evidence of the great expense involved in the actual improvement of Kuapa Pond to negate any suggestion that there was ever any reasonable economic need to improve it for navigation (Tr. 100-05; Defendants' Exhibit 31).

[31] This contention was not reached below. *See* note 1 *supra.*

to hold it navigable solely on account of tidal flow would be an illogical application of the servitude's commercial needs.[32] The Corps consistent administrative treatment of the pond as nonnavigable, until the present litigation, is also "not without significance."[33] *United States v. Oregon,* 295 U.S. 1, 23 (1935).

Even assuming that the ebb and flow test may form a valid basis for a servitude over certain tidal waters, the government may make no claim on that ground to Kuapa Pond. By passage of § 95 of the Organic Act, Congress recognized unique exclusive rights in Hawaiian fish ponds, thereby surrendering any servitude it arguably might have had. This surrender was in fact recognized by the government until the early 1970's when it first asserted a right of public access to Kuapa Pond. An analogy is found in *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 610-11 (3d Cir. 1974), where land filled in 1927 was characterized as having "long since been surrendered" due to lack of Corps of Engineers objection prior to 1970. Likewise, the

[32] The Government is wont to rely upon general language such as: "[Congress'] power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water." *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U.S. 251, 263 (1915); "[W]hatever rights [existed] in the land below the mean high-water line were subordinate to the public right of navigation. . . ." *Willink v. United States,* 240 U.S. 572, 580 (1916); and, "The dominant power of the federal Government, . . . , extends to the entire bed of a stream, . . ." *United States v. Chicago, M., St. P. & P. R.R. Co.,* 312 U.S. 592, 596-97 (1941).

The language used was apt for the facts of those cases as each involved delineation of the limits of a single river. No separate water body was involved in any of these cases; nor was the ebb and flow test applied. Such general language is hardly firm footing for resurrection of ebb and flow from a 100 years of repose as a qualification on the general navigability-in-fact test.

[33] It continued to do so even after development began and listed Kuapa Pond as a private facility in its 1964 report on Hawaiian coastal waters (Defendants' Exhibit 16).

Corps failed to express any interest in or concern over activities in Kuapa Pond from annexation until after 1970.

B. *The Navigation Servitude Does Not Apply to Privately Improved Nonnavigable Waters.*

This Court has never maintained that the navigation servitude is coextensive with commerce clause regulatory authority. Indeed, in *United States v. Kansas City Life Insurance Company,* 339 U.S. 799 (1950), the more limited nature of the servitude was expressly acknowledged:

> It is not the broad constitutional power to regulate commerce, but rather *the servitude derived from that power and narrower in scope,* that frees the Government from liability in these cases. . . . (Emphasis added.)

339 U.S. at 808.

The distinction between regulatory authority and the servitude has always existed. Regulatory power always had a broader scope as *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690 (1899), long ago settled in holding that the upper Rio Grande was nonnavigable but nonetheless subject to regulation. Recent expansion of the regulatory power merely highlights a fundamental distinction which has long existed.

The boundary of the servitude lies at the limit of "public" navigable waters. Although regulation has travelled far beyond these bounds, the servitude has not. This Court has never applied the servitude to fast lands, nor to nonnavigable waters, at least without an express determination by Congress that inclusion was essential to a comprehensive navigable waters improvement program. *United States v. Cress,* 243 U.S. 316, 325-26 (1917). *Cf. United States v. Grand River Dam Authority,* 363 U.S. 229, 232-33 (1960).

The justification for dominant national control over navigable waters has been the need "to preserve" them for present or future commercial needs. *See Economy Light & Power Co. v. United States,* 256 U.S. 113, 123-24 (1921); *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 404-05 (1940). For this purpose, the nation's navigable waters have been considered to have "always" been subject to the servitude. This view was expressed in *Gibson v. United States,* 166 U.S. 269, 276 (1897), and has been adhered to ever since. *E.g., United States v. Rands,* 389 U.S. 121, 123 (1967); *United States v. Commodore Park, Inc.,* 324 U.S. 386, 390-91 (1945). This Court expressed the same point in *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799, at 808 (1950):

> The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. . . . (Citations omitted.)

The premises upon which the navigation servitude have been based—that the nation's waters must be "preserved" and that the private right in the underlying soil has "always" been subject to the servitude and "long has been limited" by the paramount public rights it represents—have no validity as to nonnavigable waters. The public has never been interested in their preservation and should not care whether they are improved for water traffic or allowed to deteriorate and become even less navigable than

before. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69-70 (1913) ("no public interest" in nonnavigable streams). There is no public expectation of their improvement nor any logical right to their uncompensated use as improved.

While this Court has not rendered an opinion directly on point, *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), does come close to the mark. The Maine legislature had authorized private parties to undertake improvements on the River Penobscot to render upper stretches of the river navigable, granting an exclusive license to navigate the improved stretch for twenty years. The grantees' assignee completed the work and put steamboats into service. Veazie appeared with his own steamboat, properly enrolled and licensed for the coasting trade, and placed her on the river until enjoined. As opposed to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), *Veazie* involved an exclusive license for internal commerce on locally improved nonnavigable waters. This Court, in distinguishing *Gibbons* declared:

> A license to prosecute the coasting trade, is a warrant to traverse the waters washing or bounding the coasts of the United States. *Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the watercourses partaking of the character of canals exclusively within the interior of the State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is,* in the first place, a departure from the obvious meaning of the document itself, and *an abuse wholly beyond the object and the power of the government in granting it.* (Emphasis added.)

55 U.S. at 575. While conceptions of federal power over local commerce are no longer as limited as then envisioned, this Court's discussion of the lack of public right to navigate privately improved nonnavigable internal waters remains as persuasive today as at that time.

More recently, the United States Attorney General reached the same conclusion. His opinion was requested as to the federal right to take over waterways owned by the State of Illinois in advance of a formal transfer of title. The Attorney General recognized such a right as to portions which were improved navigable streams.[34] As to wholly artificial portions, however, which like nonnavigable streams had never been subject to the servitude, he concluded that these could not be appropriated without compensation.[35]

> Although such an artificial waterway, if a highway of interstate commerce, would be subject to regulation by Congress and its waters would be within admiralty jurisdiction, *it does not follow that the United States*

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[34] In *United States v. Cress*, 243 U.S. 316, 326 (1917), this Court itself recognized that navigable rivers which were "canalized" by the government would remain navigable waters despite their improvement. Continued subjection of a navigable stream made more navigable at public expense is, of course, a quite different matter than subjecting a private nonnavigable water body improved at private expense to a public servitude.

[35] Canals constructed at public expense were usually open to the public subject to payment of reasonable tolls. *See, e.g., Huse v. Glover*, 119 U.S. 543 (1886); *Sands v. Manistee River Improv. Co.*, 123 U.S. 288 (1887). They were public because they were public highways built by the states or under their charter, just as are modern freeways, not because of any dominant federal servitude. They therefore could be abandoned at any time. *See, e.g., Walsh v. Columbus, Hocking Valley & A. R.R. Co.*, 176 U.S. 469 (1900); *Kirk v. Maumee Valley Elec. Co.*, 279 U.S. 797 (1929).

> *could take possession of it, appropriate it, exclude the owner, and deprive the latter of any investment upon it.* (Emphasis added.)

36 OP. U.S. ATT'Y. GEN. 203, 214 (1930).

Although Kuapa Pond now has also been held subject to federal regulation, there is no basis to burden it further with the navigation servitude and free public access. The servitude's rule of "no compensability" is harsh even as applied to public navigable waters. To apply the servitude to privately improved nonnavigable waters such as Kuapa Pond would be a particularly severe extension—one transforming a doctrine intended to preserve *public* waters into a device for expropriation of *private* waters.

C. *Application of the Navigation Servitude to Nonnavigable Waters Would Constitute an Unjustified Intrusion Into Local Real Property Issues.*

Extension of the navigation servitude to Kuapa Pond involves enormous implications. Nonnavigable water bodies located entirely within a single state, which heretofore have never been considered susceptible to commerce, will be potential objects of dominant federal power. The acknowledged legal distinction between public navigable waters and private nonnavigable waters will be abrogated. The servitude will extend to thousands of private waters never before within its reach.[36]

To subject these local waters to the servitude serves no valid federal interest. When the question is surface use

[36] In point of fact, the Corps of Engineers deems all water bodies subject to the Rivers and Harbors Act to be subject to the navigational servitude and has represented to this Court that all permits are now and will continue to be conditioned upon the permittee's agreement to permit "the full and free use by the public" (Opp. Brief at 19-20).

of internal waters, as opposed to use of the public navigable water highways, the states themselves should be the arbiters.

This Court has often emphasized that the states are sovereign over navigable waters and the lands beneath them, subject only to the paramount need of the United States for purposes of control of interstate commerce. *E.g., United States v. Texas,* 339 U.S. 707, 716-17 (1950); *United States v. Oregon,* 295 U.S. 1, 14 (1935). The states are free to determine title rights of owners of lands abutting navigable waters. *E.g., Shively v. Bowlby,* 152 U.S. 1, 40-47 (1894). The states are also free to define the extent of riparian rights in navigable waters. *E.g., St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners,* 168 U.S. 349, 358-66 (1897).

State sovereignty was recently reaffirmed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977), by its holding that state law generally controls issues relating to riparian property:[37]

> This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

[37] This Court overruled its opinion in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), which had applied federal common law to determine title to reemerged lands. This Court refrained from overruling *Hughes v. Washington,* 389 U.S. 290 (1967), which had applied federal law to determine title to accretions on ocean-front property, noting that the fact that ocean boundaries were there involved was sufficiently different to justify application of federal common law. *See* 429 U.S. at 377 n. 6. Whatever vitality *Hughes* retains is of no consequence here, however, where no dispute has arisen as to the boundary between land and ocean for boundary purposes.

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. . . .

429 U.S. at 378.

When the riparian property rights relate to private nonnavigable waters, as here, the reasons for applying state law are even more compelling. No pre-existing navigation servitude qualifies state control. No general public interest exists in private waters.

IV.

Mandating Public Access to Kuapa Pond Violates Fifth Amendment Protections Against Uncompensated Takings.

A. *Kuapa Pond Was Never Subject to Any Superior Public Navigation Servitude.*

Bishop Estate, and its lessee Kaiser Aetna, hold exclusive title to the beds, walls and waters of Kuapa Pond, and are entitled to exclude all others therefrom. Kuapa Pond is a private body of water which has never been subject to the navigation servitude.

As the District Court, the tribunal most familiar with the present problem, properly held:

> [T]he dominant federal navigation servitude arises from the common law *public* right to pass over *naturally* navigable waters.
>
> . . .
>
> Here, however, . . . there never existed any public rights in or to the waters of Kuapa Pond, nor did its transformation into the present marina, by private

> funding, create, *ipso facto,* any *public* rights therein or thereto.
>
> . . .
>
> [W]hile Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed waterway without paying a reasonable compensation for the use thereof.

(Pet. App. 31a-32a.) The Ninth Circuit cavalierly dismissed this proposition without analysis.

B. *This Court Has Not Previously Considered Whether a Public Water Area Can Be Created Under the Guise of a Navigation Servitude.*

While the navigation servitude has been the subject of repeated litigation, a case by case review will not be of significant utility because the Court has not confronted circumstances comparable to the present case.[38] Hereto-

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[38] *Gibson v. United States,* 166 U.S. 269, 275-276 (1897) (no compensation need be paid where access to the Ohio River was cut off as an incidental consequence of construction of a federal dike); *United States v. Bellingham Bay Boom Co.,* 176 U.S. 211, 218 (1900) (compensation required when the government ordered abatement of a boom on the Nooksack River constructed prior to passage of the Rivers and Harbors Act); *Scranton v. Wheeler,* 179 U.S. 141, 164-65 (1900) (riparian proprietor not entitled to compensation when access to St. Mary's Falls ship canal waters destroyed by government project); *United States v. Lynah,* 188 U.S. 445, 470 (1903) (compensation required when property in cultivation inundated by dam raising water level of the Savannah River); *Union Bridge Co. v. United States,* 204 U.S. 364, 401 (1907) (no compensation awarded for incidental loss when alterations to a bridge over the Allegheny River were required by Secretary of War pursuant to Rivers and Harbors Act); *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 62, 68-69 (1913) (no compensation awarded when power company's plant on St. Mary's River and uplands were condemned in the interest of improving naviga-

fore, when governmental authorities invoked the servitude to avoid compensating a private entity or individual, a specific project existed. In this case, no dam, irrigation, reclamation or hydroelectric project will be facilitated; no

tion); *Lewis Blue Point Oyster Cult. Co. v. Briggs*, 229 U.S. 82, 88 (1913) (no compensation awarded for destruction of proprietor's oyster beds in Great South bay incident to government dredging in the interests of navigation); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 267-68 (1915) (no compensation awarded where wharves located within harbor on Elizabeth River were required to be removed); *Willink v. United States*, 240 U.S. 572, 580 (1916) (no compensation paid when proprietor prevented from renewing wharves necessary for ship repair business on Savannah River); *Louisville Bridge Co. v. United States*, 242 U.S. 409, 417-18 (1917) (no compensation awarded where bridge alterations were required to relieve an obstruction to navigation on Ohio River); *United States v. Cress*, 243 U.S. 316, 326 (1917) (compensation granted to property owner for decreased land value where government dam caused inundation of nonnavigable tributary; *United States v. Appalachian Power Co.*, 311 U.S. 377, 427 (1940) (no compensation need be paid when government, pursuant to Federal Power Act, takes over power project on New River because no private property right existed in the flow of a navigable stream); *United States v. Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 597 (1941) (no compensation for loss of embankment when government dam raised water level of Mississippi River); *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-93 (1945) (no compensation paid to riparian owner when navigability of creek adjacent to bay destroyed by government dredging for Hampton Roads Naval Base); *United States v. Willow River Power Co.*, 324 U.S. 499, 509-10 (1945) (no compensation when proprietor's channel from nonnavigable tributary to navigable stream was impeded by government dam project on Mississippi River); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808-812 (1950) (compensation required for waterlogging private agricultural land bordering a nonnavigable tributary caused by dam and lock project on Mississippi River); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (no compensation payable for value of land as power site taken for flood control project for Savannah River Basin); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 236 (1960) (no compensation awarded when development potential of nonnavigable stream was destroyed by government dam completed as an integral part of a comprehensive plan to regulate navigation, control floods and produce power); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 629-30 (1961) (compensation awarded for loss of

obstruction to navigation such as a wharf, dike or pier will be abated, and no environmental protection will be achieved with respect to Kuapa Pond which cannot be accomplished by regulation.

The Corps of Engineers is not acting to protect avenues of commerce when their activity results in the creation of a public water recreation area. In *Federal Power Commission v. Niagara Mohawk Power Co.*, 347 U.S. 239, 249 (1953), this Court recognized that an attempt to exercise the navigation servitude for nonnavigational purposes "requires clear authorization" in explicit terms. Congress has not specifically authorized the Corps of Engineers to pursue any project or purpose within Kuapa Pond.

This Court's decided cases may only be harmonized to the extent that when a private property right was recognized, payment of compensation was required. Conversely, when private property was held to have been burdened with a dominant servitude, and an authorized public project was advanced, the noncompensability rule was applied.

In the analogous case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893), a private right to control access to a navigable water via a system of locks and tolls was taken by condemnation. The government was required to pay for the franchise, as well as for tangible personal property. The Court emphasized that congressional power to regulate commerce was limited by the fifth amendment just compensation clause. *Id.* at 336.

an easement caused by dam on Roanoke River based on the nonriparian value of the property); *United States v. Rands*, 389 U.S. 121, 125-26 (1967) (compensation award pursuant to government's comprehensive Columbia River development plan could not include property value as port site).

While *Monongahela* has been distinguished as resting "primarily upon the doctrine of estoppel . . .," *e.g., United States v. Rands,* 389 U.S. 121, 126 (1967), it has not been overruled and remains a signal case concerning the proper exercise of the federal navigation servitude. Its principles of fairness and equity are applicable in the instant case. *See also United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 631 (1961).

Petitioners' loss will be closely akin to that of the franchise owner in *Monongahela.* The franchisor maintained exclusive navigation rights and charged tolls in exchange for permission to pass. When the government condemned its right, compensation was awarded. In the case of Kuapa Pond, Petitioners charge maintenance fees, similar to tolls, in exchange for permission to use its privately maintained waters for limited recreational purposes.

Dictum in *Scranton v. Wheeler,* 179 U.S. 141 (1900), is relevant, even though the riparian property owner was found not to be entitled to compensation when his access to a publicly navigable river was destroyed.

> Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use. What is private property within the meaning of that Amendment, or what is a taking of private property for public use, is not always easy to determine. No decision of this court has announced a rule that will embrace every case.

Id. at 153. The Court proceeded to discuss *Monongahela* as an instance requiring compensation because there was an actual taking of vested private rights, *i.e.,* locks, dams and the franchise to collect tolls, and distinguished Wheeler's claim to be entitled to access, because it found he had no such private right. If the Circuit Court decision herein is affirmed, both tangible and intangible property will be taken without compensation. *See also Louisville Bridge Co. v. United States,* 242 U.S. 409, 422-23 (1917).

The government never expressed any interest in Kuapa Pond until 1971 when it had been improved at great expense. These private efforts transformed Kuapa Pond from a shallow fish pond into a pleasant recreational haven and small boat harbor. The government seeks to appropriate these waters at no public expense.

C. *The Invasion of Petitioners' Private Property Is a Constitutionally Prohibited Taking.*

This Court recognized that private ownership of waters exists in *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913). "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *See also United States v. Twin City Power Co.,* 350 U.S. 222, 241 (1956) (separate opinion). Kuapa Pond is wholly upon the land of Petitioners, and does not qualify as a great navigable water body by any standard set forth by this Court.

The loss of the rights to control surface use and to charge maintenance fees will render Petitioners and the residential lot lessees the victims of the worst of two worlds. On one hand, costly original investment and improvements will be confiscated (Defendants' Exhibit 31; Tr. 100-05).

On the other hand, dredging and other maintenance activities will have to be continued if the Pond is to be preserved in its present condition.

Security problems may result from the loss of privacy. Until the Ninth Circuit decision, a patrol boat insured that unauthorized persons did not gain entrance to Kuapa Pond and possible access to homes, in a manner similar to a fast land restricted residential development with controlled private street access.

Environmental problems may result if private funding for the pond ceases. As the Corps of Engineers has no funds to maintain the pond (R. 260-261), termination of private dredging operations will cause silt to build-up in the channels (Tr. 101-02), and termination of patrol boat operations will result in an accumulation of debris and litter (Defendants' Exhibit 37).[39]

Finally, increased pollution and boat traffic may interfere with fishing and fish propagation which the government has consistently conceded to be Petitioners' exclusive right.

The result will be a *public* water playground. Yet, the government denies both the need to compensate Petitioners for their loss and any responsibility to maintain the pond.[40] If the public enjoys recreational surface uses, fairness and

[39] The dangers are illustrated by *Botton v. State*, 69 Wash.2d 751, 420 P.2d 352 (1966). There, the state's action in granting public access to a private lake created such major environmental problems and nuisance to private property owners that the court enjoined the state from permitting public access without compensation.

[40] The government candidly stipulated below that it had no intention of appropriating any funds for maintenance of Kuapa Pond (R. 261).

justice require the public to contribute to requisite maintenance and to pay for the costly improvements made by private funding.

1. Mandating public access is a taking, not an exercise of regulatory authority.

That which the government seeks to accomplish by exercising "regulatory" authority may properly be termed inverse condemnation, *i.e.*, the expropriation of private property absent employment of eminent domain proceedings, thus destroying Petitioners' exclusive enjoyment of its property rights.

In *Wilfong v. United States*, the Court of Claims set out:

> [T]he principle that to support a Fifth Amendment taking via inverse condemnation there must be not only a Federal activity or project which is permanent in nature, but that such activity or project must impose on private property certain consequences which are themselves permanent, and that their recurrence is inevitable even if only intermittent. By "permanent" we include a servitude of indefinite duration.

480 F.2d 1326, 1329 (Ct. Cl. 1973). This theme is echoed in *United States v. Dickinson*, 331 U.S. 745, 748 (1947). "Property is taken in a constitutional sense when inroads are made upon an owner's use of it to an extent that, . . . a servitude has been acquired. . . ."

Additionally, courts have distinguished taking and regulation by considering the purpose of the activity. For instance, where restrictions are placed on private property to prevent public harm, such restrictions are noncompensable police power exercises, while, on the other hand, restrictions through which the public attains benefits it did

not previously possess are takings requiring compensation. Justice Brandeis distinguished regulation and taking in *Nashville, Chattanooga & St. Louis Railway v. Walters,* 294 U.S. 405, 429 (1935):

> It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. (Citation omitted.) . . . But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. (Citation omitted.)

See also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-414 (1922); *Goldblatt v. Hempstead,* 369 U.S. 590, 594-95 (1962). *See generally* 1 NICHOLS, EMINENT DOMAIN § 1.42 (3d rev. ed. 1976). No public harm is sought to be prohibited in Kuapa Pond, rather the government seeks to attain for the public benefits it has not heretofore possessed.

The power of eminent domain is often exercised to establish public recreation and historic areas. *See, e.g., Shoemaker v. United States,* 147 U.S. 282 (1893); *United States v. Gettysburg Electric Railway Co.,* 160 U.S. 668 (1896); *Rindge Co. v. Los Angeles County,* 262 U.S. 700 (1923); *Roe v. Kansas ex rel. Smith,* 278 U.S. 191 (1929). Accordingly, if the government wants to provide the public with the recreational opportunities of Kuapa Pond, it should follow condemnation procedures and pay the defendants for the value of their private rights.

2. When private property is taken for public use, just compensation is required.

The fifth amendment prohibits taking of private property for public use without due process of law and payment of just compensation. This Court affirmed that the fifth amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). If the Corps of Engineers, under the guise of regulatory authority pursuant to the commerce clause, is permitted to mandate public surface use of Kuapa Pond, Petitioners will be forced to bear what should be a public burden.

D. *The Navigation Servitude Has Been Expanded Beyond Its Intended Scope and Merit Clarification.*

Petitioners do not quarrel with a properly limited notion of superior federal power over water bodies traditionally considered to have been subject to a public right of way. However, usurpation of Petitioners' private right to Kuapa Pond on the pretext of the navigation servitude creates an unwarranted exception to the fifth amendment, representing a dramatic departure from every other exercise of authority under the commerce clause or alternative constitutional power.

Public policies distinguishable only on the basis of land and air versus water are irrational and illogical. The government argues, and the Ninth Circuit holds, that taking private water rights by tacking the navigation servitude to regulatory power is noncompensable. Yet, courts have consistently held that to obtain public or common rights to land or air space, presumably equally sacrosanct, requires compensation. *See United States v. Causby,* 328 U.S. 256 (1946); *Griggs v. Allegheny County,* 369 U.S. 84 (1962);

Richards v. Washington Terminal Co., 233 U.S. 546 (1914); *Shoemaker v. United States, supra; United States v. Gettysburg Electric Railway Co., supra; Rindge Co. v. Los Angeles County, supra; Roe v. Kansas ex rel. Smith, supra.*

The Ninth Circuit and the government recite the history of the servitude by way of justifying its expanded application in the present case. The government claims that no obligation to pay compensation exists because it is merely invoking the navigation servitude. Therefore, nothing has been "taken," *i.e.*, waters deemed subject to the servitude were always subject to an easement in favor of public use, simply awaiting determination of when and where it might be exercised with impunity to destroy private rights.[41] The foregoing rationale is unsatisfactory in this and similar circumstances, where private water bodies exist which were never subject to a public right of way.[42] *See generally*

[41] In some cases, the riparian proprietor of a water body is said to have been on notice that its property is subject to a dominant public interest, therefore, it is not entitled to compensation and invests funds for improvements at its own risk. *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Union Bridge Co. v. United States*, 204 U.S. 364, 400 (1907). *See also* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1, 23-5 (1963).

Public use of Kuapa Pond cannot be sustained on a "notice theory" as no one ever considered Kuapa Pond public, and Petitioners could not have been on notice that a servitude might one day be invoked to destroy their investment. A notice theory may support the servitude doctrine in some cases, but in all instances its scope must be limited to waters deemed navigable pursuant to tests applicable when the servitude first attached.

[42] The inequity of such an action was recognized in *Sneed v. Weber*, 307 S.W.2d 681 (Mo. App. 1957), wherein the owner of the lands underlying a fresh water lake had undertaken privately to effect improvements so that boating was possible. Although difficult, access to the Mississippi River was available. The argument that the owner had transformed the lake into public waters was rejected on several grounds in an opinion analyzing both state and federal

MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 513 (1975).

The expansive American application is even more difficult to understand because the servitude has been characterized as derived from and narrower than the commerce clause. *See, e.g., United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950). In any case, nowhere does the Constitution provide that the commerce clause, however contorted its application may become, is superior to the fifth amendment. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *Scranton v. Wheeler*, 179 U.S. 141, 153-54 (1900).

Originally, the no compensation rule may have been a reasonable consequence of the government's need to protect publicly navigable waters. Critical, however, to contemporary evaluation of attempts to invoke the servitude is the knowledge that when the Constitution was adopted and early decisions established the servitude's existence, virtually all American commerce was by water. Until the advent of the railroad in the Nineteenth Century, "commerce" and "navigation" were nearly synonymous, with only visionary thinkers dreaming of overland and air "highways" supporting the bulk of contemporary commerce. *See* Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 671 (1963).

In these circumstances to deny compensation on the ground that the servitude is merely the exercise of a public

cases. "To declare the drainage ditch and Weber Lake navigable waters would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression." (Citation omitted.) 307 S.W.2d at 689.

right is an abuse of power, and should not be done in the absence of an unquestioned historic foundation for the public right claimed. No such historic foundation exists here. As one commentator has pointed out: "It is of doubtful propriety to rationalize the continued preference of waterways on the basis of reasons that are no longer applicable." Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 NAT. RES. J. 1, 31 (1963). *See also Note,* 19 CASE WEST. RES. L. REV. 1116, 1122-23 (1968).

In the case of Kuapa Pond, the attempted noncompensable taking of private property cannot be justified as incident to a noncompensable exercise of regulatory powers pursuant to commerce powers. If Petitioners' property were taken in the exercise of a different power for a different purpose, compensation would be mandatory. *See* 2 CLARK, WATER AND WATER RIGHTS § 101.5 (1967).

The public navigation servitude is uniquely severe. This power over waters has no parallel on land. The servitude has been subject to severe criticism even as traditionally applied; so harsh a doctrine should be strictly limited. The nation's commercial needs can be satisfied without destroying private rights.

CONCLUSION

The judgment of the Circuit Court reversing the District Court's denial of an injunction mandating public access to Kuapa Pond should be reversed.

Respectfully submitted,

RICHARD CHARLES BOCKEN
DIANE DESKINS HASTERT
DAMON, KEY, CHAR & BOCKEN
10th Floor, 810 Richards Street
Honolulu, Hawaii 96813

GEORGE RICHARD MORRY
ROBERT BRUCE GRAHAM, JR.
HAMILTON, GIBSON, NICKELSEN
RUSH & MOORE
20th Floor, Hawaii Building
745 Fort Street
Honolulu, Hawaii 96813

Counsel for Petitioners